SUPREME COURT, U.S. 71-629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

Supreme Court, U.S.
FILED
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ROBERT SEAVER, CLERK

JUAN ISIDRO VALDEZ; TOMAS GALLEGOS; VENTURA CHAVEZ; MARIA MADRIL, individually and as the next friend of MERCEDES MADRIL, CORDELIA MADRIL, and DESI MADRIL; ROSARITO GARCIA, by her next friend ISABEL GARCIA; MARINO MOYA; JOE W. PADILLA; FILOMENA VALDEZ, individually and as the next friend of ELIZARDO VALDEZ,

Petitioners,

—v.—

JOE BLACK, Chief of the New Mexico State Police; JOHN JOLLY, Adjutant General and Commander of the New Mexico National Guard; ALFONSO SANCHEZ, District Attorney for the First Judicial District of New Mexico; CARLOS JARAMILLO, JUAN SANTISTEVAN, LIONAL RODELA, FRED MARTINEZ, TOMMY HOLDER, HOOVER WIMBERLY, T. J. CHAVEZ, MARTIN VIGIL, MONROE ALEXANDER, ALBERT WHITEHOUSE, RUBEN GOMEZ, GILBERT A. SILVA, MAX WATSON, BRUCE GLASCO, Members of the New Mexico State Police; and WILLIAM A. OAKLEY, and JOE L. SANCHEZ, Members of the New Mexico National Guard,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on July 8, 1971.

Citations to Opinion Below

The United States District Court for the District of New Mexico wrote no opinion. Its judgments, based upon jury verdicts against the petitioners and in favor of the respondents, are contained in the record at R. 227-39.[1] The opinion of the United States Court of Appeals is reported at 446 F.2d 1071 and is set forth in the Appendix, *infra* at pp. 1a-16a.

Jurisdiction

The judgment of the United States Court of Appeals was entered on July 8, 1971. On September 27, 1971, Mr. Justice White signed an order extending the time within which to file this petition to and including November 6, 1971. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether officers and members of a state National Guard, mobilized to assist civilian law enforcement officials in dealing with a civil disturbance, are, in the absence of an insurrection or declaration of martial law, subject to the restraints of the Fourth Amendment.

2. Whether the respondents met their burden of establishing probable cause:

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[1] The record on appeal included two successively paginated volumes of pre-trial papers and trial exhibits which will be referred to as "R. ____" and eight volumes of trial testimony which will be designated as "T. ____."

(a) for the detention of those petitioners who were part of a large group of men, women and children camped out at a ranch near Canjilon, New Mexico;

(b) for the arrest and detention of petitioner Juan I. Valdez; and

(c) for the arrest and detention of petitioner Elizardo Valdez.

3. Whether police efforts to discourage persons from attending an Alianza meeting, by setting up roadblocks and distributing notices advising persons to return home, deprived Alianza members of rights guaranteed by the First Amendment.

Statute Involved

Section 1983 of Title 42 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Proceedings Below

The petitioners brought this civil rights action pursuant to 42 U.S.C. Sections 1983 and 1985, seeking damages for the deprivation of constitutionally protected rights. The petitioners were all members or relatives of members of an organization known as the Alianza Federal de Mercedes

composed of Spanish-speaking Americans and concerned with asserting a variety of political and land grant claims. The defendants were the Adjutant General and two officers of the New Mexico National Guard, the Chief of the State Police and certain of his subordinates, and the local district attorney (App., *infra*, p. 2a). The complaint alleged that the defendants, by a series of actions during late May and early June 1967, conspired to and did deprive the petitioners of federally protected rights of free speech and assembly and the right to be free from unreasonable searches and seizures (R. 52-63). Each petitioner sought damages in the amount of $3,000.

The case was tried to a jury and verdicts and judgments were entered against all the plaintiffs except one who was awarded a damage verdict against four state police officers (App., *infra*, pp. 2a-3a). On appeal the petitioners argued, *inter alia*, that the instructions to the jury concerning the limited liability of the National Guard were improper and that the arrests and detentions by the National Guard and other state officials were without probable cause. The Court of Appeals disagreed, affirming the judgments (App., *infra*, pp. 7a-16a).

Statement of the Case

The Court of Appeals Opinion

The Court of Appeals opinion, viewing the evidence in the light most favorable to the respondents, indicates the highlights of "the rather tangled factual background out of which the present litigation stems" (App., *infra*, pp. 3a-7a). On Sunday, May 14, 1967, the Alianza held a meeting in Tierra Amarilla, New Mexico. On Thursday, June 1,

1967, respondent Alfonso Sanchez, then the district attorney in Rio Arriba County, obtained arrest warrants for leaders of the Alianza, charging that the May 14 meeting was an unlawful assembly. In the afternoon and evening of Friday, June 2, 1967, the day before an Alianza meeting scheduled to be held in Coyote, New Mexico, various Alianza leaders, including the petitioner Juan I. Valdez, were arrested and jailed. On June 3, 1967 police roadblocks were set up leading to Coyote and individuals were warned about violating the unlawful assembly statute and urged to return home.

Another Alianza meeting was scheduled for Monday, June 5, 1967 at the Tobias Leyba ranch near Canjilon, New Mexico. That morning, Alianza members and their families assembled at the ranch for a picnic meeting and overnight camp. Shortly after noon, a group of Alianza members left for Tierra Amarilla and took over the courthouse for two hours, firing shots, wounding and kidnapping public officials, trapping a judge in his courtroom. The raiders left at about five o'clock and some of them were pursued back to the ranch, with the State Police and thereafter the National Guard converging on the ranch. Some time after police officials entered the ranch, men, women and children from the camping area were marched up to the ranch house by state police. A few individuals who had been identified as participants in the raid were singled out and arrested. Most of the campers were detained and questioned for almost three hours, after which they were allowed to return to their camp. National Guardsmen were posted around the camp until late the following afternoon, Tuesday, June 6, 1967 when the members and their families were told they could leave.

Amplification of Facts From the Record

This characterization of the evidence by the Court of Appeals requires some amplification so that the issues tendered for review can be placed in their proper perspective.

The Arrest of Juan Valdez

On its face the verified criminal information submitted by the district attorney to secure arrest warrants did not specify what overt acts had been committed to carry out the unlawful purpose of the May 14 meeting (R. 248).[2] Both the district attorney and the judge testified that Mr. Sanchez had given the judge information indicating that following the meeting, Alianza members took steps to implement its allegedly unpublicized, unlawful purposes (T. 675, 1339-46). But there was no evidence that petitioner Valdez, who was elected a councilman at the meeting, had committed any subsequent, implementing overt acts or that any such acts were committed on the date of the meeting.

Petitioner Valdez and most of the other Alianza members for whom the warrants had been issued were arrested on Friday afternoon and evening, June 2 (T. 1056-60). It is undisputed that the officers who arrested Mr. Valdez on Friday night did not have the arrest warrant in their possession. He was released from jail on Sunday, June 4, arraigned the next day and never prosecuted (T. 21-26, 74-76). The petitioner claimed that his arrest and detention were without probable cause and unlawful.

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[2] And even the allegation of unlawful acts had to be penciled in by Judge Scarborough (T. 673).

The Alianza Meeting at Coyote

Following the issuance of the arrest warrants on June 1, 1967, the district attorney, Respondent Black, Chief of the State Police, and certain of his aides gathered at the district attorney's request to discuss the execution of the arrest warrants and plans for the June 3 Alianza meeting scheduled to be held in Coyote (App., *infra*, p. 4a) (T. 1176-77). There were discrepancies in the defendants' evidence as to whether the district attorney had advised them that *any* Alianza meeting would constitute an unlawful assembly (T. 115-18, 128-29, 1176-77, 1262-64, 1349-50). But it was agreed that roadblocks would be established "as a bit of preventive work" (T. 1351-52), people would be warned about unlawful assembly and firearms, names would be taken, and a notice prepared by the district attorney would be distributed (T. 134, 877-79, 1402).[3] The roadblock

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[3] The notice read as follows:

NOTICE TO ALL FOLLOWERS OF REYES LOPEZ TIJERINA

1. All persons participating in any unlawful assembly anywhere for the purpose of planning to take property of another by force without legal process will be charged with the crime of unlawful assembly punishable by up to six (6) months in jail and $100.00 fine.
2. All persons participating in taking by force and threats any property of another without his consent or without legal process will likewise be charged with the crime of extortion punishable by up to ten (10) years in the penitentiary and $5,000.00 fine.

TAKING PROPERTY OF ANOTHER BY FORCE IS THE COMMUNIST WAY. YOU ARE BEING MISLEAD [sic]. PLEASE RETURN HOME (Plaintiff's Ex. 14; R. 276)

The District Attorney made the same type of remarks in a newspaper article on June 2, urging all Alianza members to "stay home" and threatening to file criminal charges against "anyone who does participate." Pl.'s Ex. 2, R. 266.

was set up, cars were stopped and checked, but no one turned back. One state police officer testified that no meeting was actually held because Reies Tijerina failed to appear (T. 1066). The petitioners argued that these actions infringed their rights under the First Amendment.

The Canjilon Episode

The central issues in this lawsuit arose out of the events which transpired at the Leyba ranch on June 5 and 6, 1967. Another meeting of the Alianza was scheduled for Monday, June 5 at the Leyba ranch. It was there that a group of Alianza families, including some of the petitioners, assembled in a field down the hill from the Leyba ranchhouse (T. 204-09). Later that afternoon the raid on the courthouse was launched from the ranch (App., *infra*, p. 5a).

The Court of Appeals characterized the two-hour violent attack on the courthouse as an "insurrection." It was not. The very state officials responsible for quelling the disturbance did not conceive of it as such. Shortly before 4:00 P.M., while the raid was in progress, Judge Scarborough's court reporter managed to reach an aide of the Governor (T. 647-49). The Governor was out of the state, so the aide informed Lieutenant Governor Francis of the situation. The Lieutenant Governor phoned General Jolly and advised him to stand by in the event he was needed (T. 1133). Shortly before 5:00 P.M., Mr. Lagormarsino, an aide to Colonel Black, phoned the Lieutenant Governor and requested the assistance of the Guard (T. 1132-33), whereupon the Lieutenant Governor proclaimed the existence of a "state of Extreme Emergency" in Rio Arriba County and directed General Jolly to mobilize the National Guard

(T. 1133-34). Had he chosen to, the Lieutenant Governor could have proclaimed a state of insurrection; but he did not. Instead, he proclaimed a state of "extreme emergency" a characterization not within any of the statutory or constitutional categories.[4]

Meanwhile, Colonel Black was proceeding toward Tierra Amarilla after learning of the raid (T. 1179). He instructed Mr. Lagormarsino by radio "to hold off on the National Guard" until Colonel Black could get to the scene and appraise the situation to see whether assistance was necessary (T. 1180, 1223-24). Thereafter, when he learned that the Guard was already on its way, he instructed them to stand by at a Ghost Ranch until further orders (T. 1224). Thus, despite the statement in the Proclamation, Colonel Black never himself requested the assistance of the Guard, and he testified at the trial that he never said that civilian law enforcement could not cope with the situation (T. 1224).

Nevertheless, General Jolly ultimately dispatched approximately 350 Guardsmen in full combat equipment, supported by two armored personnel vehicles, to the Canjilon area (T. 986-89, 1009). This was the first call-up of its kind in the General's long experience with the National

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[4] Article 5, section 4 of the New Mexico Constitution authorizes the Governor to call out the military "to preserve the public peace, execute the laws, suppress insurrection, and repel invasions." The New Mexico Statutes, section 9-1-7, provide:

> Proclamation of a state of insurrection.—Whenever any portion of the national guard, or of the unorganized militia, or both, is employed in aid of civil authority the governor, if in his judgment the maintenance of law and order will thereby be promoted, may by proclamation declare the county, or city, or both, in which the troops are serving, or any specified portion thereof, to be in a state of insurrection, and may declare martial law therein.

Guard (T. 1001). He viewed his mission as supporting the State Police (T. 381, 985) and understood that Colonel Black was in command (T. 388-90).

At approximately 7:00 P.M. Colonel Black and various state police officers entered the Leyba property; Lebya surrendered and was arrested at the house (T. 892-96). Someone then told Colonel Black that "there were a bunch of women and children down there in a campsite over the hill" out of sight (T. 1184). Simultaneously, the campers were marched up the hill, hands on their heads, at gun-point, by the state police for investigation and interrogation (T. 212, 894-96, 1184, 1250). Petitioners Ventura Chavez and Marino Moya testified that they had been unaware of the raid or of the approach of the state police, that the police made them sit in the mud, and that Moya was told he would be shot if he refused to comply (T. 211, 251-53, 278, 286-90).

The district attorney arrived at about the same time and there were discussions among the officials as to what to do with these people. Meanwhile, Respondent Martinez, a state police official, took names and addresses, checked for weapons and asked questions (T. 795-98). The district attorney testified that he believed all these people could be arrested as aiders and abettors or for harboring a felon, so advised Chief Black and ordered them arrested (T. 1227, 1356-58). Captain Vigil testified that the district attorney instructed Colonel Black to take all the people, women and children included, to the Tierra Amarilla courthouse for interrogation, since women and children were at the raid (T. 896). Vigil suggested sending for paddy wagons from the nearby Dulce Police Department (T. 897); one arrived

at about 10:00 P.M. and some women and children got into it (T. 897-98) and remained there for about 20 minutes (T. 1186).

Chief Black, learning that the district attorney had left the vicinity and concerned that the facilities at Tierra Amarilla would be inadequate to accommodate the people, ordered them out of the wagon (T. 1186-87, 1232) and directed them to return to their campsite.

When they emerged from the paddy wagon, there were National Guardsmen stationed all around them (T. 303, 1232). An After Action Report prepared by National Guard Captain Oakley on June 26, 1967 stated:

> . . . a group of people had been gathered by the State Police and were being escorted by the police into a paddy wagon for movement out of the area. The patrol of National Guardsmen was asked to provide a small perimeter around this group of people to prevent escape while being loaded into this vehicle. Approximately 15-20 minutes later, I was approached by a State Policeman and asked to guard this group of people overnight as it had been decided not to move said people out of the area that night (Pl.'s Ex. 15, R. 277).

Chief Black testified that the Guard was there to protect the campers in the event more gunfire occurred (T. 362, 1189, 1234), implying that the campers would have been free to leave had they so desired or requested. But General Jolly testified that anyone who attempted to leave the perimeter would be restrained by force (T. 383, 1009). The petitioner Chavez explained that curfew and other restrictions were imposed, guards were posted around the barbed-

wire enclosure, latrine requests were required, and the people were told that they would be shot if they attempted to leave (T. 224-25). The people remained under guard in their camp that night and the following day. There were thirty Guardsmen at the ranch, with ten on duty at any one time (T. 992). At about 4:00 P.M., Colonel Black and General Jolly went down to the campsite and, according to the General, Chief Black "told these people that they were released and I informed my people that they were no longer on guard duty . . ." (T. 997, 1011-12, 1192-93).

The issues arising out of this episode are twofold: (1) whether the National Guard officials involved were required to satisfy Fourth Amendment standards and (2) whether those officials and the other respondents had probable cause for their actions.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to determine whether in actions under 42 U.S.C. Section 1983 National Guardsmen, called out to assist civilian law enforcement officials in dealing with a civil disturbance, are immune from liability for arrests made without probable cause.

The trial court instructed the jury that when called out by the Governor, a National Guard commander "may use the measure of seizing the bodies of those whom he considers to stand in the way of restoring peace" and that members of the Guard would be immune from liability for such detention if "made in good faith and in the honest belief that it was necessary under the circumstances . . . " (App., *infra*, p. 8a). The trial court based its instruction on language in this Court's decision in *Moyer* v. *Peabody*, 212 U.S. 78 (1909).[5] The petitioners questioned *Moyer's* continued validity and its application to this case and urged that the standard of conduct must be the same for both the National Guard and the state police, namely that any arrests or detention must be based on probable cause. The Court of Appeals explicitly disagreed, holding the instruction proper. The case thus squarely raises the issue of the

[5] Similar language had also appeared in two New Mexico state court decisions, *State ex rel. Charlton* v. *French*, 99 P.2d 715, 44 N.M. 169 (1940) and *State ex rel. Roberts* v. *Swope*, 38 N.M. 53, 28 P.2d 4 (1933).

proper constitutional standard to govern the conduct of the National Guard.

A. *The importance of the question*.

The frequency with which members of the National Guard have been mobilized to assist law enforcement agencies in the last few years has been unprecedented. Testifying before the President's Commission on Campus Unrest, Major General Winston P. Wilson, Chief of the National Guard Bureau, noted that between January 1968 and May 1970, the Guard had been utilized on 324 occasions to suppress civil unrest. 116 *Cong. Rec.* E. 7302 (daily ed. Aug. 4, 1970). Over 220,000 National Guardsmen were involved in these call-ups. *Ibid.* In Ohio alone, the Guard was brought in to deal with civil disturbances on 23 occasions; in May of 1970, Guardsmen were called on to 21 American university campuses. *Ibid.* See *Report of the President's Commission on Campus Unrest,* 174 (G.P.O. 1970). The impact of these statistics is manifest by the fact that in the previous quarter of a century, from the end of World War II until 1967, the National Guard had dealt with such disturbances on only 72 occasions, *Hearings Before Special Subcommittee of the House Armed Services Committee to Inquire into the Capability of the National Guard to Cope With Civil Disturbances,* 90th Cong. 1st Sess., 5679, 5860-63 (hereinafter, *Hearings*) (Testimony of David E. McGiffert, Under Secretary of the Army).[6]

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[6] It is interesting to note that in the average call-up, only 10% of the state National Guard capacity is utilized. *Hearings* at 5863. On only two occasions, Watts in 1965 and Detroit in 1967, has more than 50% of the state National Guard been employed. The Guardsmen called out in the instant case, which, incidentally was described by the Army as a "civil disturbance," constituted only 12% of the state militia. *Ibid.*

There have been other eras in our nation's history when the state militia or National Guard has played a prominent, often stormy role. From the 1870's to the time of World War I, the state militia was constantly mobilized to quell labor unrest. See generally, *The History of Violence in America: A Report to the National Commission on the Causes and Prevention of Violence,* 281-338 (Bantam Ed. 1969) (hereinafter, *Violence in America*); Higham (ed.), *Bayonets in the Streets: The Use of Troops in Civil Disturbances,* 78-98 (University Press of Kansas, 1969). Often the activities of the state troops in restoring order "resulted in defeating the strike. The lesson was not lost to some employers who, with the connivance of local public officials, secured military aid in situations where violence was absent or insignificant." *Violence in America, supra,* at 317. The tempo of National Guard call-ups declined somewhat between the two World Wars. However, in the mid-1930's, particularly in 1935, there was an upswing once again, and in all parts of the country "in small and large disputes alike, Governors were increasingly inclined to dispatch their troops to cope with the strikers." *Id.* at 356. According to the National Guard Bureau, in that year alone state troops were mobilized on 84 occasions to deal with "civil disturbances."

From that time until the mid-1960's, there was decreasing resort to the state militia. However, beginning with the urban disorders in the summer of 1967, the pendulum has begun its return and we have once again emerged into a period where the Guard is mobilized with great frequency in support of civilian law enforcement.

We have rehearsed this history to demonstrate that once again the National Guard is functioning as the nation's

auxiliary police force, its "gendarmerie", *Violence in America, supra* at 431. Occasionally, and tragically, the call-up of the Guard has resulted in deaths which "need not and should not have occurred." *Report of the President's Commission on Campus Unrest, supra* at 233. More usually, as reflected in this case, the call-up may result in arrests and detentions. The conduct of the Guard in recent campus and urban disorders has been subject to substantial criticism. *Report of the President's Commission on Campus Unrest, supra,* at 174-81; *Report of the National Advisory Commission on Civil Disorders,* 497-506 (Bantam Ed. 1968). If the Guard is going to be used with increasing frequency to perform a police function, then it becomes imperative for this Court to declare the proper reach of the Guard's constitutional powers and determine whether the Guardsman has greater authority than the policeman he is assisting.[7]

B. *The need to reconsider* Moyer v. Peabody

The Court of Appeals relied on *Moyer* v. *Peabody, supra* in holding that members of the National Guard, even though they are supporting and subordinate to civilian law enforcement officials, nevertheless possessed greater powers under the Fourth Amendment. The petitioners submit that *Moyer* v. *Peabody,* properly read, does not apply to this litigation. Alternatively, if that decision is deemed to control suits against National Guardsmen, then it must be reconsidered.

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[7] Identical issues concerning the liability of Guardsmen in the wake of the events at Kent State and on other campuses are pending in other cases. See, *e.g., Scheuer* v. *Rhodes,* —— F. Supp. ——, No. C70-859 (N.D. Ohio, 1971), *app. pending,* No. 71-1624; *Dressman* v. *Cargo,* No. 8563 (D. N.M.) (pending).

Moyer involved a damage action, brought under the predecessor of 42 U.S.C. Section 1983, against a governor, adjutant general and National Guard captain. The Governor had ordered Moyer's arrest and imprisonment because of his activities as a mine union leader. 212 U.S. at 82-84. Moyer charged that his arrest was without probable cause. On the explicit assumption that a state of insurrection did exist, and that the Governor had acted in good faith, Justice Holmes announced the rule:

> So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief. 212 U.S. at 85.

Thus, *Moyer* embodied a qualified executive privilege available to a governor only when an *actual insurrection* exists. In its subsequent decision in *Sterling* v. *Constantin*, 287 U.S. 378 (1932), this Court specifically limited *Moyer* to the "point actually decided", namely, that in an insurrection, "the temporary detention of one believed to be a participant" did not give rise to a cause of action for damages against a governor. 287 U.S. at 400.[8]

When read as limited to situations of actual insurrection, *Moyer* is premised on a fundamental principle deeply

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[8] *Sterling* also overruled the *Moyer* premise that a governor's determination of the need for the use of military force is unreviewable by the judiciary. Thereafter courts frequently scrutinized the governor's decision and granted injunctive relief against the use of the Guard. *Faubus* v. *United States*, 254 F.2d 797 (8th

rooted in English history: that there is a juridical distinction between war and insurrection, on the one hand, and civil disorder and disturbance, on the other. The principle of expedient resort to force appropriate in war has no place in civilian situations so long as the courts can function. See generally, D. Engdahl, *Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders* (Mimeo, 1971). Either one of two regimes will obtain: (1) the rare instances where events are so perilous and civil authority so totally lacking that a state of war or insurrection exists, justifying extraordinary measures or (2) the usual situation where civilian agencies and courts are functioning. By definition, an insurrection is a situation which justifies the imposition of martial law; and "martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration." *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2, at 127 (1866). In such perilous moments, *Moyer* allowed a governor to act on less than probable cause.

Cir.), *cert. denied,* 358 U.S. 829 (1958) (injunctive relief granted against use of National Guard); *Wilson & Co.* v. *Freeman,* 179 F. Supp. 520 (D. Minn. 1959) (same); *Joyner* v. *Browning,* 30 F. Supp. 512 (W.D. Tenn. 1939) (same); *United States* v. *Phillips,* 33 F. Supp. 261 (N.D. Okla. 1940), *vac. on other grounds,* 312 U.S. 246 (1941); *Strutwear Knitting Co.* v. *Olson,* 13 F. Supp. 384 (D. Minn. 1936) (same); *Russell Petroleum Co.* v. *Walker,* 162 Okla. 216, 19 P.2d 582 (1933) (same); *Hearon* v. *Calus,* 178 S.C. 381, 183 S.E. 13 (1935) (acts of governor subject to judicial review). See *Cox* v. *McNutt,* 12 F. Supp. 355 (S.D. Ind. 1935) (denying relief, but stating acts of governor are reviewable); *Powers Mercantile Co.* v. *Olson,* 7 F. Supp. 865 (D. Minn. 1934) (same). See also, *Bright* v. *Nunn,* —— F.2d —— (6th Cir. 9/24/71), No. 21022.

No such situation existed in Rio Arriba County on June 5, 1967. None of the state officials attempting to deal with the raid on the courthouse thought that they were confronted with an insurrection. The Lieutenant Governor did not proclaim the existence of an insurrection, though he had statutory authority to do so. The State Police Chief did not himself request the Guard and never felt that the situation was beyond the control of civilian law enforcement. The Adjutant General considered himself as under the direction of the State Police. The raid terminated after two hours and the few hostages escaped shortly thereafter. The Court of Appeals was simply wrong in its terse conclusion that "a very real insurrection" had occurred. Accordingly, its approval of the *Moyer* charge was improper and the Court should grant review to reaffirm. that the holding of *Moyer* is a limited one.

Alternatively, if *Moyer is* viewed as authority for the "good faith" rule adopted by the courts below, then it must be reconsidered. The petitioners submit that *Moyer* is a sport; it is a decision without precedential support or progeny. Decisions of this Court prior to *Moyer* made it clear that even in situations of insurrection or war, state militiamen or federal troops were held to an objective standard of liability for damages to person or property. *Luther* v. *Borden,* 48 U.S. (7 How.) 1 (1849) (during an insurrection, state militiamen must have reasonable grounds to arrest or search) (dictum); *Mitchell* v. *Harmony,* 54 U.S. (13 How.) 115 (1851) (the taking by Army officers of property during wartime can be justified only on reasonable grounds; the defense of "an honest judgment" was held insufficient); *Bates* v. *Clark,* 95 U.S. 204 (1877) (good faith is not a defense to a suit against

Army officers for false arrest and imprisonment during the Civil War). Such soldiers were liable for their torts of trespass and false arrest or imprisonment, regardless of whether they acted in good faith; good faith was no defense, it merely goes to the issue of damages. To the extent that *Moyer* implies otherwise, it is at variance with precedent.

Moyer has had as limited a progeny as it had progenitors. *Sterling* v. *Constantin*, *supra* undermined it as a possible bar to injunctive relief against the improper use of the National Guard. See footnote 8, *supra*.[9] And many state courts have ignored *Moyer*, holding national guardsmen to the same standard of liability as peace officers for false arrest. See, *Franks* v. *Smith*, 142 Ky. 232, 134 S.W. 484 (1911); *Bishop* v. *Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924); *Orr* v. *Burleson*, 214 Ala. 257, 107 So. 825 (1926); *Allen* v. *Gardner*, 182 N.C. 425, 109 S.E. 260 (1921). These decisions cast severe doubt on the continuing vitality of *Moyer* v. *Peabody* and its application to the situation involved in this case.

C. *The considerations of constitutional and statutory policy*

The ruling below not only rests on bad law, but it embodies unsound constitutional and statutory policy as well.

The central fact emerging from the recent history of the utilization of the Guard is that the Guard has almost

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[9] Since *Sterling*, *Moyer* has been cited by this Court on only three occasions. It appeared in a footnote in *Duncan* v. *Kahanamoku*, 327 U.S. 304, 314, n. 10 (1946) (as being inapposite to the issue before the Court) and twice in dissenting opinions, *Adamson* v. *California*, 332 U.S. 46, 83 (1947) and *Monroe* v. *Pape*, 365 U.S. 167, 214, n. 20 (1961).

always been mobilized to *assist* civilian law enforcement. See Testimony of Major Wilson, 110 *Cong. Rec., supra* at E. 7304. That was precisely the situation here, with General Jolly's troops called out explicitly and functionally to support the state police. The state police, of course, are bound by the Fourth Amendment requirements of probable cause and are liable in damages if they act without it. *Monroe* v. *Pape,* 365 U.S. 167 (1961). Yet the Court below held that National Guard officials have greater powers of arrest and detention and are entitled to be judged by a far looser standard of conduct than the police officials who are their functional and legal superiors.[10] Such an anomalous rule of law is reminiscent of the discarded "silver platter" doctrine, see *Elkins* v. *United States,* 364 U.S. 206 (1960). It allows a citizen's rights to vary depending on which state official ordered the invasion of those rights and on whether a policeman or a guardsman effected the order. With over 400,000 Guardsmen potentially available as police officers, it is not an insignificant problem.

Not only do the interests protected by the Fourth Amendment require a different rule, but the policies underlying 42 U.S.C. Section 1983 compel the same conclusion. In *Monroe* v. *Pape,* this Court, reading the statute "against the background of tort liability that makes a man responsible for the natural consequences of his actions," *id.* at 187, held that its history and purposes required a strict standard of liability for police officers who act without probable cause. *Pierson* v. *Ray,* 386 U.S. 547 (1967) held

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[10] Many states, by court decision or statute, have afforded guardsmen the same, though not greater, powers to arrest as peace officers in the normal situation. See, *e.g., Franks* v. *Smith, supra;* Cal. Pen. Code Section 830.2 (1969); Ga. Code, Ch. 86-1308 (Acts, 1969).

that mere good faith standing alone, without probable cause, was not a sufficient defense to a false arrest action under the statute.[11] *Pierson* and *Monroe* undermine the interpretation of the statute embodied in *Moyer*. If guardsmen are going to function as policemen then they should be held to the same standard of conduct as policemen in actions under Section 1983.

The issues posed here have not been squarely examined by this Court since its decision in *Moyer*. Subsequent events and decisions require that those issues be considered once again.

[11] *Pierson* also held that the statute was not intended "to abolish wholesale all common-law immunities." 386 U.S. at 554. Here, of course, the common law at the time the statute was enacted held militia men and soldiers to an objective, probable cause standard for arrest, imprisonment or trespass. See pp. 19-20, *supra*.

II.

Certiorari should be granted because the decision below, holding that there was probable cause for the various arrests and detentions, conflicts with this Court's decisions enunciating Fourth Amendment requirements.

Numerous decisions of this Court have evolved a Fourth Amendment jurisprudence by which to judge the legality of any particular intrusion on a citizen's privacy. While those decisions have almost always been rendered in the criminal context, their holdings apply as well to Section 1983 actions brought to redress the deprivation of Fourth Amendment rights. See *Monroe* v. *Pape*, *supra*. The petitioners submit that the decision below ignores these principles. The various arrests would not withstand scrutinizing in the criminal context and they are equally invalid here. The Court should review the decision below and so hold.

A. *The detention at the ranch*

Before a police officer may intrude upon the citizen's privacy by an arrest, detention or search, he must act upon specific facts which support probable cause. See *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry* v. *Ohio*, 392 U.S. 1, 21, n. 18 (1968). It was ignored here.

To justify the detention of a large group of men, women and children, the respondents relied on the following information: (1) that Alianza members and families were camped at the ranch, (2) that the raid was launched from

there and that a group of the raiders subsequently returned there, (3) that there had been women and children at the courthouse, (4) that a few Alianza members specifically identified as having participated in the raid were found among the campers, (5) that other raiders were still at large. This information did not constitute probable cause as to *each* specific individual who was detained.[12] The question is whether "at that moment the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck* v. *Ohio*, *supra* at 91. Put another way, based on the information the officials claimed they had, would a neutral magistrate have issued arrest warrants for all of the individuals seized? In implicitly holding that he would, the Court of Appeals decision conflicts with the decisions of this Court and should be reviewed.[13]

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[12] There is no dispute that the campers were detained at least for a period of almost three hours, from the time they were marched up the hill at gunpoint until they exited from the paddy wagons. "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry* v. *Ohio*, *supra* at 16. That this detention continued overnight and into the next afternoon was confirmed by the testimony of General Jolly who stated that the Guardsmen would have restrained anyone who tried to leave and of Chief Black who did not explicitly tell the campers they could leave until the next day. "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether those intrusions be termed 'arrests' or 'investigatory detentions.'" *Davis* v. *Mississippi*, 394 U.S. 721, 726 (1969).

[13] Nor can the detention even be justified as something less than a full blown arrest which must be supported by probable cause. In *Terry* v. *Ohio*, *supra* this Court recognized "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he

B. *The arrest of petitioner Juan Valdez*

Here also, the decision below conflicts with this Court's teachings. First, the Court of Appeals sustained the trial court's refusal to allow the jury to consider whether the facts upon which the arrest warrant was based constituted probable cause. Yet, this Court has always looked behind a warrant to scrutinize the factual basis and decide whether it supported the issuance of a warrant. See, e.g., *Spinelli* v. *United States*, 393 U.S. 410 (1968); *Whitely* v. *Warden of Wyoming Penitentiary*, 28 L. Ed. 2d 306 (1971). Second, this Court has held that an arrest, to be valid, must not only pass muster under federal constitutional standards, but must be lawful under state law as well. See, *Ker* v. *California*, 374 U.S. 23 (1963). In New Mexico, an officer may not make a misdemeanor arrest without a warrant unless the misdemeanor is committed in his presence. See, *Ulibarri* v. *Maestas*, 74 N.M. 517, 395 P. 2d 238 (1964); *Cave* v. *Cooley*, 48 N.M. 478, 152 P. 2d 886 (1944). Here, the arresting officers did not possess the warrant; thus rendering the arrest illegal under state law and therefore in violation of federal requirements.

C. *The arrest of Elizardo Valdez*

The determination that this arrest was lawful is also in conflict with the relevant decisions of this Court which have

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is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." 392 U.S. at 27. But any such interference with a citizen's personal security must not only be justified at its inception, but also must be "reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 19-20. Even assuming the circumstances warranted rounding up, identifying and frisking the petitioners, there was absolutely no justification in the exigencies of the situation for the detention which ensued.

consistently held that an informant's tip, without any basis for crediting it, provides no support for an arrest. See, e.g., *Spinelli* v. *United States, supra.*[14] The key item of information upon which the police relied came from two individuals who emerged from a crowd and claimed they had overheard the petitioner admitting complicity in the raid. The officers did not know these individuals and thus had no basis for relying upon their information. A magistrate would not have issued a warrant upon such facts, nor did they justify the arrest.

III.

The Court should determine whether the First Amendment allows law enforcement officials to attempt to discourage persons from attending a political gathering.

There is a heavy presumption against the constitutionality of any form of prior restraint on First Amendment activities. See, *New York Times Co.* v. *United States*, 403 U.S. 173 (1971); *Carroll* v. *Commissioners of Princess Anne County*, 393 U.S. 175, 181-82 (1963). In *Carroll*, this Court invalidated an ex parte injunction issued against a white supremacist group restraining them from holding public rallies.

Here, the respondents attempted to effect the equivalent of such a restraining order by resorting to a form of "self help." They set up roadblocks, they advised people that any participants in an unlawful assembly would be prosecuted and they passed out notices urging Alianza members to "please return home."

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[14] The facts surrounding the arrest are set forth in the Court of Appeals opinion, *App., infra;* pp. 6a-7a.

The petitioners submit that the Court should decide whether such efforts by law enforcement officials to inhibit people from attending political gatherings came within the principles enunciated in *Carroll*.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 6, 1971

Opinion of the United States Court of Appeals, Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MAY TERM—1971

No. 108-70

JUAN ISIDRO VALDEZ, *et al.*,

Plaintiffs-Appellants,

—v.—

JOE BLACK, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

(D.C. No. 7242)

JOEL M. GORA (Melvin L. Wulf, Jonathan B. Sutin, Paul A. Phillips, with him on the brief), *for Plaintiffs-Appellants.*

SUMNER S. KOCH (William W. Gilbert, of White, Gilbert, Koch & Kelly, and Joyce Blalock, Special Assistant Attorney General, with him on the brief), *for State Police Appellees.*

MARK B. THOMPSON, III, Assistant Attorney General (James A. Maloney, Attorney General, with him on the brief), *for Defendant-Appellee John Jolly.*

PATRICIO S. SANCHEZ (Serna & Sanchez with him on the brief), *for Defendant-Appellee Alfonso G. Sanchez.*

Before BREITENSTEIN, MCWILLIAMS, and DOYLE, *Circuit Judges.*

MCWILLIAMS, *Circuit Judge.*

This is a civil rights case brought pursuant to 42 U.S.C. §§1983 and 1985. According to the complaint, the thirteen plaintiffs are all either members of, or related to members of, an organization composed of Spanish-speaking Americans known as Alianza Federal de Mercedes.

The nineteen defendants are grouped as follows: (1) Alfonso Sanchez, the district attorney for the first judicial district of the State of New Mexico; (2) Joe Black, Chief of the New Mexico State Police; (3) fourteen named persons who are members of the New Mexico State Police; (4) Adjutant General John Jolly, Commander of the New Mexico National Guard; and (5) two named persons who are members of the New Mexico National Guard.

The gist of the complaint is that the nineteen defendants by their various and sundry actions growing out of a succession of independent though related events occurring over a period of time of about one week had under color of state law deprived the plaintiffs of rights guaranteed them by the United States Constitution, specifically the right of free speech and assembly, the right to petition their government for redress of grievances and the right to be free from unreasonable searches and seizures and arrest. Each plaintiff made claim for $3,000.

Trial by jury culminated in verdicts for the defendants on the claims of twelve of the thirteen plaintiffs. The jury

returned a verdict in favor of one plaintiff, Sevedeo Martinez, and against four members of the New Mexico State Police in the amount of $3,000. The present appeal is directed to the judgments entered dismissing on the merits the claims of all plaintiffs other than Martinez.

One of the announced objectives of the Alianza is to recapture certain land which it believes rightfully belongs to its members in particular and United States citizens of Spanish or Mexican ancestry in general. The series of events which form the basis for the present proceedings occurred from about June 1 to 6, 1967, during which time the Alianza held several mass meetings and reached a climax on June 5, 1967, when members and relatives of members of the Alianza conducted an armed raid in the courthouse in Tierra Amarilla, New Mexico.

At this stage of the proceedings the evidence, which needless to say was in some dispute, is to be viewed in a light most favorable to the prevailing party in the trial court, namely, the several defendants. Larabee Flour Mills Co. v. Carignano, 49 F.2d 151 (10th Cir.); Seifert v. Solem, 387 F.2d 925 (7th Cir.). Viewed in such light, the voluminous evidence adduced upon an eight day trial is summarized not so briefly as follows:

(1) On May 14, 1967, the Alianza held a meeting in the courthouse in Tierra Amarilla, the county seat of Rio Arriba county, at which time the Alianza planned a "take-over" of the local government of Tierra Amarilla and "elected" their own slate of officers who were to assume various offices to which others had theretofore been duly elected or appointed;

(2) by May 31, 1967, it became public information that the Alianza would hold another mass meeting on June 3, 1967, at Coyote, New Mexico;

(3) on June 1, 1967, the one defendant Sanchez, the district attorney, appeared before a district judge seeking issuance of arrest warrants and upon the presentation thus made the judge caused warrants to issue for the arrest of some eleven persons who had participated in the earlier Alianza meeting of May 14, 1967, one warrant calling for the arrest of Juan I. Valdez, one of the plaintiffs, on a charge of violating the state statute on unlawful assembly;

(4) Sanchez, the district attorney, had several meetings on or about June 1 and 2, 1967, with Joe Black, Chief of the New Mexico State Police, and three or four of its members, at which time Sanchez delivered the eleven arrest warrants to Black for execution and at the same time there was also general conversation regarding the upcoming meeting of the Alianza;

(5) concerning the scheduled meeting of the Alianza on June 3, it was agreed that the State Police would establish roadblocks on the highways leading to Coyote and would advise those desiring to attend that they could do so but that if the assembly turned into an "unlawful" one, guilty parties would be prosecuted;

(6) on June 2, 1967, Valdez was arrested in his home at about ten o'clock in the evening and taken to the county jail in Santa Fe, where he was later released on a cash bond on or about June 4;

(7) the Alianza held their scheduled meeting in Coyote on June 3, 1967, though its leader, Reies Tijerina, was not present, he being one of the eleven for whom arrest warrants had issued, with that particular warrant not having been executed as of the June 3 meeting;

(8) the State Police did set up roadblocks in connection with the Coyote meeting, advising those desirous of attending that though they could assemble peaceably, any violation of the state's unlawful assembly statute would be the subject of prosecution, with none of those thus advised being deterred from attending the meeting in question;

(9) another meeting of the Alianza was thereafter scheduled for June 5, 1967, at the Tobias Leyba ranch near Canjilon, New Mexico, and on the morning of June 5, 1967, many members of the Alianza, together with their families, began to assemble on the Leyba ranch for an overnight camp;

(10) shortly after noon on June 5, 1967, a group of Alianza members and relatives, armed with guns, dynamite and knives, set out from the Leyba ranch for Tierra Amarilla and this group forcibly "took over" the courthouse in that town from about three till five p.m., during the course of which numerous shots were fired, public officials were wounded and kidnapped and for some two hours the courthouse was in the control of insurrectionists;

(11) a district judge, who was literally a prisoner in his own courtroom during the raid, sensing that the situation was beyond the control of the local authorities, caused his reporter to first call the State Police, and when the reporter was unable to contact the State Police he then called the office of the Governor of the State of New Mexico to report the nature and extent of the armed rebellion;

(12) the Lieutenant Governor, then acting as Governor, thereupon issued a proclamation declaring Rio Arriba County, Tierra Amarilla being the county seat, to be in a

state of extreme emergency and called out the National Guard to assist in restoring peace and order;

(13) the courthouse raiders left Tierra Amarilla about five o'clock p.m. and returned to the Leyba ranch, with the State Police, and eventually the National Guard, converging upon the Leyba ranch;

(14) the persons thus found on the Leyba ranch were thereafter marched in small groups from the camping area to the ranch house proper by the State Police, with the National Guard later giving some assistance, where they were interviewed, with names and statements and the like being taken, and then, though there was talk of arresting all, most were allowed to return to their camp;

(15) however, some of those participating in the raid on the courthouse were singled out of the group camping on the Leyba ranch and arrested, with other participants in the raid fleeing the group and disappearing into the nearby woods;

(16) on the late afternoon of June 6, 1967, the State Police and the National Guard left the Leyba ranch and the members of the Alianza and their families were permitted to leave the area if they desired.

Two of the plaintiffs, Filomena Valdez and her son Elizardo Valdez (no relation to the plaintiff Juan I. Valdez) base their respective claims on events occurring in the aftermath of the courthouse raid. Moments after the raid, as the raiders were en route from Tierra Amarilla to the Leyba ranch near Canjilon, Elizardo, age fifteen, was arrested by State Police. The police made the arrest on the basis of statements from two citizens who came forth out

of the milling crowd and reported to the officers that they had just overheard Elizardo say that he was in on the raid and had participated in its planning. The circumstances were that the informants overheard Elizardo's remarks, ran over and informed the police of what they had just heard. This all occurred on the streets of Canjilon where things were in a general state of confusion. Elizardo, apparently seeing the informants talking to the police, fled the scene at once on horseback, with the police thereupon giving immediate chase in an automobile. It was in this setting that the arrest was made about which Elizardo now complains. In his later statement to the officers, Elizardo stated that he was not actually a participant in the raid, though he had known about it in advance and had sat in on some of the planning of the raid.

Other State Police on a couple of occasions a day or two after the raid went to the home of Filomena Valdez in search of two of her sons who were believed to have participated in the raid. Mrs. Valdez testified that the officers in question had unlawfully searched her home for the two suspects. The officers in turn denied any search of the Valdez home and testified that the only time they were ever in Mrs. Valdez' home was at her invitation for a friendly chat over a cup of coffee.

The foregoing recitation hopefully depicts the rather tangled factual background out of which the present litigation stems.

I.

As above indicated, all of the plaintiffs now appealing, except Juan I. Valdez, Elizardo Valdez and Filomena Valdez, complain of their so-called "mass detention" at Canjilon.

and assert that they were thus arrested or detained in violation of their constitutional rights by joint action of the district attorney, Sanchez, the State Police under Joe Black and the National Guard under General Jolly. As concerns the standard of conduct for the National Guard, the trial court instructed the jury as follows:

> "When acting within the power vested in him, the Governor or the Acting Governor may order into active service the militia of the state and direct into what locality they shall go or operate. The Governor is made the sole judge of the facts that may seem to demand the aid and assistance of the military forces of the state. To his good judgment and sound discretion, the law has left the final decision as to whether the military arm of the state shall be ordered into active service.
>
> "When the Governor orders into active service the National Guard after determining that its aid and assistance is necessary, the commander of the Guard may use the measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power.
>
> "If you find from the evidence that the Governor had called out the National Guard and declared a state of extreme emergency in Rio Arriba County, and that the detention of plaintiffs was accomplished by the National Guard pursuant to such proclamation, and that such detention was made in good faith and in the honest belief that it was necessary under the circumstances to preserve peace, then you should find for the defendant John Jolly and against the plaintiffs."

Plaintiffs argue that the foregoing instruction was erroneous, particularly that portion which declares that the National Guard is not liable to the plaintiffs if any "detention was made in good faith and in the honest belief that it was necessary, under the circumstances to preserve peace." It is asserted that the standard of conduct is the same for both the National Guard and the State Police, namely, that in order for any arrest or detention to be lawful, such must be based on "probable cause," as opposed to mere "good faith." We do not agree.

The trial court's instruction was based on language from Moyer v. Peabody, 212 U.S. 78, which was later approved (admittedly with some distinctions being drawn) in Sterling v. Constantin, 287 U.S. 378. In this particular connection, it is noted that even stronger language than that used in *Moyer* and embodied in the court's instruction is found in State *ex rel.* Charlton v. French, 44 N.M. 169, 99 P.2d 715 and State *ex rel.* Roberts v. Swope, 38 N.M. 53, 28 P.2d 4. In *Charlton* the Governor is said to be the sole judge of the facts that may demand the aid or assistance of the military forces of the state and in *Roberts* it was declared that the courts would not interfere with the executive in quelling disturbances and overcoming the lawless element in its resistance to authority.

By way of argument, it is intimated that *Moyer* and *Sterling* belong to another age and no longer represent the law on the subject. We reject this suggestion. Alternatively, it is contended that the language from *Moyer* used by the trial court in its instruction was taken out of context in that it presupposes an armed insurrection. In other words, it is argued, the evidence in *Moyer* admittedly disclosed that an armed insurrection in fact existed,

whereas in the instant case there was really no insurrection and hence the instruction concerning the standard of conduct of the National Guard in time of insurrection was improper. This line of reasoning permeates much of the entire argument of the plaintiffs and ignores the fact that the undisputed evidence establishes that there was a very real insurrection and civil disobedience in the armed raid on the courthouse in Tierra Amarilla. We find no error in the instruction thus given concerning the National Guard.

II.

As concerns those plaintiffs complaining about their "mass detention" at the Leyba ranch near Canjilon, it is next urged that a directed verdict in their favor should have been entered on the issue of liability and that the only matter properly to be submitted to the jury was the assessment of their individual damages. It is argued that as a matter of law there was no probable cause for any arrest or detention of any of the plaintiffs by either the State Police or the National Guard. We have now considered and rejected the argument that the National Guard is bound by the same standard as that which the parties agree is the norm for the State Police and have held that the issue as to the liability of the National Guard was submitted to the jury under proper instructions. Similarly, in our view of the matter the issue as to the liability of the State Police also posed a jury question and the jury was properly instructed in connection therewith.

The parties agree, and we proceed on that premise, that any arrest or detention of any of the plaintiffs by the State Police must be on the basis of "probable cause" and that

in connection therewith the defendants have the burden of proof. "Probable cause" was of course the subject matter of several instructions given by the trial court. The issue of probable cause in a proceeding such as the instant one is generally one for the jury unless there be no dispute in the testimony or the inferences deducible therefrom. Marland v. Heyse, 315 F.2d 312 (10th Cir.) and Stringer v. Dilger, 313 F.2d 536 (10th Cir.). Our review of the record convinces us that the issue of probable cause was properly submitted to the jury under proper instructions.

Counsel in arguing that the plaintiffs were only innocent campers soft-pedals the fact that the record clearly warrants the inference that the raid on the courthouse in Tierra Amarilla started and ended on the Leyba ranch. In other words, a meeting of the Alianza was held at the Leyba ranch on June 5, 1967, and out of the persons thus assembled some thirty, which number included men, women and children, proceeded from the Leyba ranch to Tierra Amarilla where they unlawfully and forcibly took over the courthouse. Several hours later, as dusk was beginning to set in, the raiders, or at least some of them, returned then to the Leyba ranch, with the State Police following and closing in on the entire group, with the National Guard later coming on the scene. It was in this setting that the State Police with the National Guard began to check out all persons in an effort to determine which ones had actually participated in the civil rebellion, be it as a principal or as an accessory. And as above indicated, certain of the participants were arrested as a result of these screening efforts. Under all of the circumstances of the case the issue of probable cause was a jury matter and not a matter of law to be resolved by the trial court.

III.

Certain of the plaintiffs complain about the instructions given the jury concerning Sanchez, the district attorney, relating to the immunity and the extent thereof given him by virtue of the office he held. The gist of the instruction was that the law grants immunity to a district attorney for acts done or ordered by him in the performance of his official duties as an integral part of the judicial process, but that if a district attorney abandons the performance of his official duties and commits or directs the commission of acts which are ordinary police activity instead of judicial activity and orders the arrest or detention of persons in order to prevent them from exercising their constitutional rights then he is no less liable than those who carry out his instructions. We perceive no error in the giving of this instruction and believe it to be in line with such cases as Kostal v. Stoner, 292 F.2d 492 (10th Cir.). *See also* Dacey v. New York County Lawyers' Ass'n., 423 F.2d 188 (2d Cir.), *cert. denied*, 398 U.S. 929; Kauffman v. Moss, 420 F.2d 1270 (3d Cir.), *cert. denied*, 400 U.S. 846; Peek v. Mitchell, 419 F.2d 575 (6th Cir.); Sires v. Cole, 320 F.2d 877 (9th Cir.). Indeed the instruction thus given squares pretty much with Robichaud v. Ronan, 351 F.2d 533 (9th Cir.), the only case cited by counsel on the point. In *Robichaud* it was stated that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity (integral relationship between his acts and the judicial process) ceases to exist and if he acts in the role of a policeman, he should be liable as a policeman.

IV.

At the conclusion of the plaintiffs' presentation of evidence the trial court, on motion, dismissed the claims of all plaintiffs, except Juan T. Valdez, arising out of the Coyote meeting of the Alianza on June 3, 1967. As concerns the Coyote meeting, it was the plaintiffs' theory that certain of the defendants, namely Sanchez, the district attorney, Joe Black, Chief of the New Mexico State Police, and several of the State Police conspired to and did in fact deprive them of certain first amendment rights. Actually, however, there was little or no testimony from any of the plaintiffs, except Valdez, concerning the Coyote meeting. The trial court in effect held that there was no showing of damage and that mere membership in Alianza was insufficient to carry this phase of the case to the jury. In this regard the trial court noted that no plaintiff (except Valdez) claimed that he or she was in anywise prevented by action of any defendant from attending the Coyote meeting. For all we know the plaintiffs (except Valdez) may well have attended the meeting in question. At least the testimony on this point is that no one turned back as a result of the roadblocks of the State Police. The only case cited by counsel on this particular matter, Carroll v. President and Commissioners of Princess Ann, 393 U.S. 175, is not in point. On this state of the record we find no error on the part of the trial court in dismissing the claims of those plaintiffs (except Valdez) for damages in connection with the Coyote meeting.

V.

As concerns the arrest of Elizardo Valdez and the allegedly unlawful search of the home of Filomena Valdez, counsel argues that in each instance the trial court erred in submitting the isssue of probable cause to the jury. In this regard it is asserted that where "the material facts are not in dispute the question of probable cause to issue warrants or arrest or conduct a search are to be decided by the court alone," citing such cases as Banish v. Locks, 414 F.2d 638 (7th Cir.). The converse of this proposition is equally true, namely, if the material facts bearing on the issue of probable cause to make arrests and conduct searches are in dispute, then the issue of probable cause or no probable cause must be submitted to the jury. *See* Marland v. Heyse, *supra*, and Stringer v. Dilger, *supra*.

Regarding the complaint of Filomena Valdez that certain State Police conducted an unreasonable search of her home for two of her sons (not Elizardo) who had allegedly participated in the raid, it is sufficient to note that this was purely a matter of a dispute in the evidence. Filomena's testimony made a prima facie case of unreasonable search. However, the officers in question testified that the only time they were inside Filomena Valdez' home was upon invitation and with her consent and that no search as such was ever made. Because of the dissimilar factual situation the instant case is not governed by Bumper v. North Carolina, 391 U.S. 543, as is urged by counsel. Rather this is but a controverted factual issue, and the jury by its verdict has now resolved the matter.

Concerning the arrest of Elizardo Valdez, our examination of the record convinces us that the material facts relating thereto, together with the inferences deducible there-

from, are such as required submission to the jury of the issue of probable cause. And the instructions tendered in behalf of Elizardo Valdez relating to the existence or nonexistence of "probable cause" for his arrest were in substance given by the trial court.

In this same general connection, complaint is also made that the instructions precluded the jury from reexamining the determination of probable cause made by the district judge issuing the warrant calling for Juan I. Valdez' arrest. The judge who issued the arrest warrants is of course not a defendant in the present proceeding, as it is well established that judges are immune from liability for damages in a civil rights proceeding for acts committed within their judicial jurisdiction. Pierson v. Ray, 385 U.S. 547. However, the instructions left open for jury determination the matter as to whether Sanchez, the district attorney, presented to the judge any facts which he knew were "inaccurate or not correct in order to establish probable cause" and went on to advise the jury that if Sanchez had thus misrepresented the matter then the jury should find against him and in favor of the plaintiff Juan I. Valdez. We perceive no error in the trial court's handling of this phase of the controversy.

VI.

Finally, it is urged that the court's instruction on conspiracy given the jury in connection with the claim of Juan I. Valdez was erroneous in that it was too restrictive "requiring in effect a showing of 'invidious discrimination.'" This point is only briefly alluded to and is without merit. Actually, the trial court did not by its instruction "require" a showing of invidious discrimination, and the instructions

defining conspiracy, when considered in their entirety, are proper under the facts of the case. The only authority cited on this phase of the case is Birnbaum v. Trussell, 371 F.2d 672 (2d Cir.), which we deem to be inapposite.

In sum, our study of the voluminous record convinces us that the plaintiffs have now had their day in court and that the varied issues were properly submitted to the jury under instructions that are without the defects now suggested by the several plaintiffs.

Judgments affirmed.